IN THE HIGH COURT OF BOMBAY AT GOA.

CRIMINAL APPEAL NO. 33 OF 2001.

Dilip Simepuruskar,
Central Jail, Aguada,
Sinquerim, Goa. ... Appellant.

Versus

State of Goa represented
by Officer-in-Charge,
A.N.C. Police Station, Panaji. ... Respondent.

Mr. J.P. D'Souza, Advocate for the Appellant.

Mr. S.N. Sardessai, Public Prosecutor for the Respondent State.

Coram: P.V. HARDAS, J.

Date: 20th February 2003.

ORAL JUDGMENT.

The appellant/accused, who is convicted by the Special Judge, N.D.P.S. Court, Mapusa, for offences punishable under Sections 20(b)(i) and 20(b)(ii) of the Narcotic Drugs and Psychotropic Substances Act and sentenced to undergo 3 years rigorous imprisonment and to pay fine of Rs. 1,000/- in default to undergo one month simple imprisonment and 10 years rigorous imprisonment and to pay fine of Rs. 1 lakh in default to undergo six months simple imprisonment respectively, by Judgment, dated 30th March 2001, in Special Criminal Case No. 6 of 2000, has filed the present appeal challenging his conviction and sentence for the aforesaid offences.

2. The facts necessary for the decision of the

appeal are set out hereunder:-

On 7th January 2000, at about 3.45 p.m., P.W.4 Shaikh Salim, the Police Sub Inspector of the Anti Narcotic Cell, received specific and reliable information that one person by name Dilip Simepuruskar of Umtavaddo, Calangute, would come to deliver the consignment of drugs to his customers near his house at 5.00 to 6.15 p.m.. P.W.4 Shaikh, accordingly, reduced the said information in writing and sent a copy to the Deputy Superintendent of Police of Anti Narcotic Cell Police Station. The said information is at Exhibit P.W.4/E. P.W.4 P.S.I. Shaikh then secured the presence of P.W.3 Sagar Raikar and one Shaikh Aslam as panchas. The panchas were conveyed the information received by P.W.4 P.S.I. Shaikh and were thereafter introduced to the members of the raiding party consisting of Deputy Superintendent of Police Shri Thorat, P.I. Shri Mamledar and other police officials. The raiding party which included the panchas, proceeded to Calangute at 5.00 p.m. in the jeep of the Anti Narcotic Cell Police Station and reached Calangute at 5.30 p.m.. P.W.4 P.S.I. Shaikh had the seal of the Anti Narcotic Cell, Panaji, Goa, with numerical figure 3 with Ashoka Emblem. The other members of the raiding party were in possession of a kit box containing weighing, packing, sealing materials, torches etc.. After parking the

jeep, the members of the raiding party walked towards the house of the accused Dilip Simepuruskar and hid themselves. At about 5.30 p.m. the accused came outside his house and after searching in the bushes removed one polythene bag. The members of the raiding party immediately surrounded him. P.W.4 P.S.I. Shaikh introduced himself to the accused and informed the accused that he had received specific information that the accused was having drugs and, therefore, P.W.4 P.S.I. Shaikh wanted to search him for drugs. P.W.4 P.S.I. Shaikh apprised him of his right to get himself searched in the presence of a Magistrate or a Gazetted Officer. The accused was introduced to the members of the raiding party including the panchas. The accused was holding a white colour polythene bag. He agreed to be searched by P.W.4 P.S.I. Shaikh and handed over the polythene bag, which was in his hand. On opening the same, it was found that it contained some leafy substance, which was suspected to be ganja. It was weighed and it was found to weigh 1.370 kgs.. It was packed and sealed and tied with a jute string and four seals of Anti Narcotic Cell Police Station and a label were affixed bearing the signatures of the two panchas and the accused. The members of the raiding party thereafter went to the place where the accused was earlier standing and found one polythene bag containing black colour substance, suspected to be charas. It was

found to weigh 2 kgs. It was, accordingly, packed, sealed and signed as before. P.W.4 P.S.I. Shaikh asked the accused whether he was possessing any legal documents for possession of the drugs. The accused replied in the negative. The accused was, thereafter, searched but nothing incriminating was found on his person. The members of the raiding party offered themselves to be searched by the accused but, the accused declined. Since the accused did not have valid documents to account for the possession of the drugs, he was taken in custody. The panchanama of the sequence of events, at Exhibit P.W.3/A, was drawn. P.W.4 P.S.I. Shaikh then prepared a seizure report, at Exhibit P.W.3/B. He filed a complaint, which is at Exhibit P.W.4/A and deposited the muddemal with Police Inspector Anti Narcotic Cell Police Station with a covering letter, Exhibit P.W.4/B. P.W.4 P.S.I. Shaikh then gave the necessary information to the Deputy Superintendent of Police, which is at Exhibit P.W.4/C. P.W.4 P.S.I. Shaikh issued a letter, at Exhibit P.W.1/B, for sending the muddemal property for analysis. After the receipt of the report, which is at Exhibit P.W.1/C, P.W.4 P.S.I. Shaikh filed a charge-sheet.

3. In the cross-examination P.W.4 P.S.I. Shaikh has admitted that they were at a distance of 70 to 100 metres from the house of the accused. P.W.4 P.S.I.

Shaikh has also admitted that he did not mention in the complaint the fact that the accused was searching. P.W.4 P.S.I. Shaikh has also admitted that the house of the accused was surrounded by a compound wall and the place where the polythene bag was attached was between the compound and the house of the accused. Similarly, in the cross-examination P.W.4 P.S.I. Shaikh has stated that alongwith the muddemal he had handed over the seal to the Police Inspector at the Police Station. He also admitted that he did not state in the complaint or in the panchanama that the second bag was removed from the same bushes. The reason given by P.W.4 P.S.I. Shaikh is that he could not gather from which particular bush the accused had removed the first polythene bag. In response to the Court Question, P.W.4 P.S.I. Shaikh has admitted that there are two brothers with their families staying in that house. Further he has admitted that he could see the top of the bushes from where he was standing. P.W.4 P.S.I. Shaikh has also admitted that when he entered the Police Station and made the station diary at 22.25 hours regarding the registration of the offence, he had not signed the complaint at Exhibit P.W.4/A. Similarly he has also admitted that he had seen the first polythene bag for the first time when it was in the hand of the accused. He has also admitted that he could not see the ground level from where the bag was taken from the place where they were standing.

He has then admitted:- "I could see from distance of about 70 to 80 metres that there was disturbance of the bushes so I presume that it was taken from the bushes. I did not mention about the disturbance of the bushes either in the complaint or in the panchanama. I cannot say as what time was the sunset on the day of the raid. I saw the acc. for the first time before sun set."

4. P.W.3 Sagar Raikar, the panch witness, after referring to his being called to the Police Station and accompanying the raiding party to Calangute, states that the accused took out some thing from the bushes on the left side of the house facing the said house. The raiding party then surrounded the accused. P.W.4 P.S.I. Shaikh introduced himself and apprised the accused regarding the reliable information as also apprised the accused regarding his right of being searched in the presence of a Magistrate or a Gazetted Officer. The accused declined the offer. P.W.4 P.S.I. Shaikh then opened the bag which was in the hand of the accused and it was found to contain ganja, which weighed 1.370 kgs.. The said ganja was sealed and the signatures of the panchas and the accused were obtained on the label. He further states that thereafter P.W.4 P.S.I. Shaikh searched the place from where the accused had picked up the white bag and P.W.4 P.S.I. Shaikh found one more plastic bag of white colour containing black substance.

The said substance was suspected to be charas and was weighing 2 kgs.. It was, accordingly, packed and sealed.

5. In the cross-examination P.W.3 Sagar has admitted that he was not knowing the accused before the raid and had seen the accused for the first time on the day of the raid. He has also admitted that the house of the accused was about 100 metres ahead of the place where the jeep was parked. He has further admitted that from the place where he was standing the back right side of the house of the accused was visible. He has also admitted that there were some bushes in front of the house. On the right side of the house there were bushes. He also states that when P.W.4 P.S.I. Shaikh had gone to search the bushes, he had also gone alongwith him.

6. P.W.1 is Mahesh Kaissare, who had conducted the analysis and had submitted his report at Exhibit P.W.1/C. P.W.2 is Manohar Joshi, who is working as a Scientific Assistant and who had forwarded the samples for analysis. P.W.5 is P.I. Lavu Mamledar, who had received the muddemal and the seal from P.W.4 P.S.I. Shaikh. P.W.6 is Shrish Thorat, who is Deputy Superintendent of Police in Charge of Anti Narcotic Cell at Panaji.

7. The learned trial Judge had framed a charge against the accused for offences punishable under Section 20(b)(i) in respect of possession of ganja and Section 20(b)(ii) in respect of possession of charas. The accused in his defence had filed a written statement, in which, the accused had stated that he had seen one white colour polythene bag outside the compound wall of his house being placed by one foreigner. The accused denied any knowledge regarding the contents of the said bag. Similarly, the accused denied any knowledge regarding the second polythene bag or its contents. The learned trial Court accepted the entire prosecution case and convicted the accused.

8. From the evidence of P.W.4 P.S.I. Shaikh, it is absolutely clear that he had not actually seen the accused picking up some thing from the bushes. All that he says is that the bushes were disturbed and, therefore, he presumed that the accused had picked up the polythene bag from the bushes, which was in his hand. Thus, the evidence of the prosecution does not unerringly prove that the accused had picked up the polythene bag, which was in his hand, from the bushes in front of his house. The accused was found in possession of ganja. The prosecution has been able to establish the possession in respect of ganja with the accused. The defence taken by the accused is obviously

unbelievable. According to him, he had seen some foreigner placing the bag outside his compound. The learned trial Court has rightly disbelieved the defence of the accused and has convicted him for an offence punishable under Section 20(b)(i) in respect of possession of ganja. In my considered opinion, the evidence in respect of possession of ganja is not discredited by the various admissions which have been brought out in the cross-examination.

9. In respect of the second bag, which was found in the bushes, it is urged by Mr. D'Souza, the learned counsel appearing on behalf of the appellant/accused, that conscious possession cannot be attributed to the accused. According to him, there is no evidence to suggest that the accused was in possession of the second bag, which was found in the bushes. Mr. Sardessai, the learned Public Prosecutor appearing on behalf of the State, has urged that the accused had picked up one bag from the same bushes and, therefore, knowledge regarding the second bag can be attributed to the accused.

10. Scanning the evidence of the prosecution, it is clear that P.W.4 P.S.I. Shaikh is not certain that he had seen the accused picking up the polythene bag from the bushes. The said polythene bag containing ganja was found in the hand of the accused when he was

accosted by the members of the raiding party. P.W.4 P.S.I. Shaikh in his cross-examination admitted that there are two brothers staying with their families in the said house. Thus, apart from the accused, there are other persons who are staying in the said house. Unless there is clinching evidence to suggest that the accused was aware regarding the second bag containing charas that was found in the bushes, the accused cannot be attributed the possession of the second bag found in the bushes. It would have been a different matter altogether had the second bag also contained a substance similar to the first bag and there was strong and cogent evidence that the accused had picked up the first bag from the same place from where the second bag was found. It is true that no one would place contraband articles of the value of about 1.5 lakhs to 2 lakhs outside in the bushes. But, merely on that score knowledge cannot be attributed nor can possession be attributed in respect of the second bag to the accused. Admittedly, according to the prosecution, there were other inmates in the house and in such circumstances, it is difficult to draw an inference on the basis of the proved facts that the accused was in possession of the second bag containing charas. In the peculiar facts of the case, according to me, the prosecution has been unsuccessful in its attempt to prove the offence punishable under Section 20(b)(ii) of the N.D.P.S. Act. According to

me, the accused is entitled to be given the benefit of doubt in respect of the charge under Section 20(b)(ii) of the N.D.P.S. Act. However, as held by me, the charge in respect of possession of ganja is proved to the hilt against the accused. The conviction and sentence of the accused in respect of the offence punishable under Section 20(b)(i) of the N.D.P.S. Act deserves to be confirmed.

11. In the circumstances, therefore, the appeal is partly allowed. The conviction of the appellant/accused for an offence punishable under Section 20(b)(ii) of the N.D.P.S. Act, as passed by the learned Special Judge, N.D.P.S. Court, Mapusa, in Special Criminal Case No. 6 of 2000, sentencing the accused to undergo rigorous imprisonment for 10 years and to pay fine of Rs. 1 lakh in default to undergo simple imprisonment for 6 months is, hereby, quashed and set aside. The conviction of the appellant/accused for an offence punishable under Section 20(b)(i) of the N.D.P.S. Act, as passed by the learned Special Judge, N.D.P.S. Court, Mapusa, in Special Criminal Case No. 6 of 2000, sentencing the accused to undergo rigorous imprisonment for 3 years and to pay fine of Rs. 1,000/- in default to undergo simple imprisonment for one month is, hereby, confirmed. The appellant is stated to be in custody from 7th January 2000 and is entitled to the set off under Section 428 of

the Criminal Procedure Code. Since the appellant has undergone three years rigorous imprisonment, he shall be released forthwith, if fine has been paid and if not wanted in any other case.

(P.V. HARDAS)
JUDGE.

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